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77-810

In the Supreme Court of the United States.

OCTOBER TERM, 1977.

EDWARD L. FORD,
PETITIONER,

v.

COMMISSIONER OF INTERNAL REVENUE,
RESPONDENT.

Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit.

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EDWARD L. FORD,
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v.

COMMISSIONER OF INTERNAL REVENUE,
RESPONDENT.

Motion for Leave to File Petition for Writ of Certiorari.

Now comes the petitioner and respectfully moves this Court for leave to file the annexed petition for writ of certiorari under § 1254(1) of Title 28, United States Code, directed to the United States Court of Appeals for the First Circuit, to review a judgment of that court entered on October 21, 1976, as well as the petition for rehearing denied by the aforesaid court on March 14, 1977, all of which are more particularly described in the petition, and for such other, further relief as may be just and proper.

Respectfully submitted,

FRANK J. McGEE,
LAW OFFICE OF FRANK J. McGEE,
1952 Ocean Street,
Marshfield, Massachusetts 02050.
(617) 834-4690

AFFIDAVIT OF PETITIONER EDWARD L. FORD.

I, EDWARD L. FORD, being first duly sworn, state that I am the petitioner in the above-entitled matter. I further state and depose that I believed that my attorneys of record before the United States Court of Appeals were complying in full with the procedural rules of this Court relative to the filing of a writ of certiorari, and that all such rules had been complied with. Upon learning that the foregoing was not the case, I took prompt action in seeking to remedy the failure of my attorneys of record to act within the prescribed time periods for processing my petition for writ of certiorari by contacting and retaining the Law Office of Frank J. McGee for that express purpose.

The statements made herein are true to the best of my knowledge and belief.

EDWARD L. FORD,
6 Whittier Place,
Boston, Massachusetts 02114.

COMMONWEALTH OF MASSACHUSETTS
SUFFOLK, SS.

Subscribed and sworn to before me, this day of December, 1977, by Edward L. Ford.

Notary Public
My commission expires:

In the

Supreme Court of the United States.

OCTOBER TERM, 1977.

EDWARD L. FORD,
PETITIONER,

v.

COMMISSIONER OF INTERNAL REVENUE,
RESPONDENT.

Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit.

The petitioner, EDWARD L. FORD, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit rendered in these proceedings on October 21, 1976.

Opinions Below.

The United States Court of Appeals for the First Circuit affirmed the decision of the Tax

Court of the United States without a published decision. See *Ford* v. *C.I.R.*, 546 F. 2d 413 (1976). A copy of the unpublished opinion appears at Appendix B, *infra*, pp. 15a-16a. The opinion of the Tax Court, as reported, appears at Appendix A, *infra*, pp. 1a-3a.

Jurisdiction.

The judgment of the United States Court of Appeals for the First Circuit (Appendix B, *infra*) was rendered on October 21, 1976. A petition for rehearing was denied by the aforesaid court on March 14, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Questions Presented.

1. Whether the petitioner may file late the petition for writ of certiorari where the late filing occurs through no fault of the petitioner?

2. Whether the decision of the United States Court of Appeals for the First Circuit, affirming the judgment of the Tax Court of the United States in holding that a "pro tanto payment"

issued to the petitioner in 1966 without his request in connection with the condemnation of certain realty is a realizable gain in the calendar year 1966 or in 1968 when the exact amount of the petitioner's condemnation award was determined by a Massachusetts court proceeding, is correct?

3. Whether the decision of the United States Court of Appeals for the First Circuit, affirming the judgment of the Tax Court of the United State in holding that the Commissioner of Internal Revenue did not abuse his discretion in failing to grant an extension of time within which to replace involuntarily converted property based upon petitioner's application which was timely filed on December 10, 1969, is correct?

4. Whether the stopping of interest on a condemnation award allowed by M.G.L. c. 79, § 8A, upon the issuance of a "pro tanto payment" is a violation of the just compensation clause of the Fifth Amendment as well as the due process clause of the Fourteenth Amendment.

Constitutional Provisions Involved.

CONSTITUTION OF THE UNITED STATES.

Amendment V.

"No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Amendment XIV.

SECTION 1. ". . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law . . . ."

Statement of the Case.

This appeal involved federal income taxes for the taxable years 1966 and 1968 in the amounts of $60,912.47 and $100,593.78, respectively. The decision of the Tax Court was entered on March 3, 1976. The findings of fact and opinion of the

Tax Court were entered on March 3, 1976. The findings of fact and opinion of the Tax Court are reported at 35 T.C.M. 253 (1976). The taxpayer filed a timely notice of appeal to the United States Court of Appeals for the First Circuit on May 28, 1976. The Court of Appeals (Coffin, C.J.) on October 21, 1976, affirmed the Tax Court decision. See *Ford* v. *C.I.R.*, 546 F. 2d 413 (1976). The taxpayer filed a petition for a rehearing in the Court of Appeals on March 11, 1977. The petition was denied on March 14, 1977 (Coffin, C.J.).

Prior to October 18, 1962, Edward L. Ford (hereinafter petitioner) was a tenant in common, with Richard S. Robie, of a parcel of real estate located at Soldiers Field Road and Western Avenue in Brighton, Massachusetts. The petitioner's basis in his interest in this property was $178,750. On October 18, 1962, the Massachusetts Turnpike Authority took this property by eminent domain. The proceedings between the petitioner and Robie and the Massachusetts Turnpike Authority were conducted under the provisions of M.G.L. c. 79, § 8A, which appears at Appendix C, *infra*, pp. 16a-17a.

On November 19, 1966, pursuant to the provisions of this law, the Massachusetts Turnpike Authority issued a "payment pro tanto" in the amount of $844,800 to petitioner at the behest of Robie. Petitioner's share of the "payment pro tanto" was $422,400.

Petitioner and Robie, as tenants in common, filed a petition in Suffolk Superior Court of the Commonwealth of Massachusetts for the assessment of damages resulting from the taking. The first trial for the assessment of damages, from December 5-9, 1966, was declared a mistrial. After a pecuniarily damaging delay until January 8, 1968, when the second trial ended, the petition resulted in an award of $1,500,000 to them from which the prior "payment pro tanto" of November, 1966, in the amount of $844,800 was deducted. The balance of $655,200 was paid on or about January 19, 1968. Petitioner's share of the additional award was $327,600.

No interest on the amount of $844,800 was paid for the period between November 10, 1966, and January 8, 1968. The amount of interest that would have accrued at the statutory rate of 6 per cent per year totaled $56,802. This amount was lost as a result of the mistrial and the staying of the interest.

On December 10, 1969, the petitioner applied to the District Director of Internal Revenue, Boston, Massachusetts, for an extension of time to replace the converted property. Following a request from the District Director on December 19, 1969, for additional information, petitioner sent a letter on December 31, 1969, describing the property and listing the date of taking, the basis of the property, the amount and date of the final award, and the amount of interest received. On January 19, 1970, the District Director denied petitioner's application for an extension of time to replace the converted property because the request had not been received within the time specified by § 1.1033(a)-2(c)(3), Income Tax Regs. (Appendix D, *infra*).

On October 21, 1971, petitioner reapplied for an extension of time to replace the converted property. He explained that he had not filed his original request on time because of advice given by his advisor, John Fahey, a former employee of the Internal Revenue Service. In denying petitioner's reapplication, the District Director stated that the advice of petitioner's advisor did not constitute "reasonable cause."

John Fahey is petitioner's brother-in-law. Petitioner over the years (including the years in ques-

tion) relied on him to prepare his income tax returns. John Fahey holds a treasury card to appear as a tax expert and to practice before the Internal Revenue Service.

In 1966, petitioner mentioned the pro tanto award to John Fahey. From the informal discussion that followed, Fahey assumed that petitioner had not actually received the cash and that the total award was only $422,400. Believing that only half of this would ultimately be petitioner's, and knowing that petitioner and his cotenant planned to sue for a greater amount, he came to the conclusion that petitioner did not have to mention the pro tanto award on his 1966 return. Not until 1969 did petitioner provide Fahey with documentation concerning the award.

Petitioner made several efforts to locate suitable property for reinvesting the money he had received from the taking. However, he did not replace the converted property because he believed that the prices of available property were too high, that there would not be a sufficient return of his investment, and that available property was scarce.

Following the District Director's denial of taxpayer's second request for an extension of time for

replacing the condemned property for purposes of the application of § 1033, deficiencies were asserted for the years 1966 and 1968 based on the determination that taxpayer was taxable on gain allegedly realized on the condemnation in 1966, when the "payment pro tanto" was received, and in 1968, when payment of the final award was made. Petitioner contested the deficiency determination in the Tax Court, contending (1) that he realized no taxable gain on the condemnation until 1968, when the final award was made, and (2) that he was entitled, in any event, to nonrecognition treatment with respect to such gain under the involuntary conversion provisions of § 1033 of the Internal Revenue Code, notwithstanding his failure to replace such property within the time provided by § 1033(a)(3)(B), on the ground that the Commissioner had abused his discretion in denying his application for an extension of such replacement period in light of the petitioner's reasonable cause for failure to file timely. The Tax Court rejected both contentions, and sustained the deficiencies.

The appeal to the United States Court of Appeals for the First Circuit followed. Petitioner presented similar arguments to the Circuit Court. The court, with Coffin, C.J., presiding,

affirmed the decision of the Tax Court below in an unpublished decision dated October 21, 1976, which appears herein as Appendix B. A petition for rehearing was denied on March 14, 1977. This petition for a writ of certiorari to the United States Court of Appeals for the First Circuit is presently filed.

Reasons for Granting the Writ.

I. The Late Filing of the Petition Occurs through No Fault of the Petitioner.

At the outset, it is agreed that the instant petition has not been properly filed within 90 days of the entry of judgment in the Cort of Appeals for the First Circuit, as provided in 28 U.S.C. § 2101(c). The petitioner, however, believed that his attorneys of record at the time were complying fully with the statutory procedural rules of the United States Supreme Court. Upon learning that the foregoing was not the case, the petitioner took prompt action in seeking to remedy the failure of his attorneys at the time to act within the required time period for processing

the petitioner's appeal to the United States Supreme Court.

Granting the petition for certiorari in the instant case would not establish any precedent, for the United States Supreme Court has long recognized that the purpose of 28 U.S.C. § 2101(c) is not to deny all petitioners access to the United States Supreme Court when the case is filed after the 90-day period. In *Teague* v. *Regional Commissioner of Customs, Region II*, 394 U.S. 977 (1969), the Court denied certiorari in a civil case, but, despite the late filing of the petition, the Supreme Court did not base its opinion on the lack of jurisdiction. In a lengthy dissent, Mr. Justice Black, with Douglas, J., joining, expressed his views as to the factors which contribute to the decision to grant a petition which has been filed late. Mr. Justice Black was unable to find a single case involving a delay caused by circumstances *beyond the petitioner's control* where the absolute jurisdictional prohibition was exercised. In fact, Mr. Justice Black found that several early cases interpreting Rev. Stat. §§ 997, 1008, the predecessors of § 2101(c), established the Supreme Court's "power to waive the time requirement . . . under appropriate circumstances." *Id.* at 982. Mr. Justice Black cited

Grigsby v. *Purcell*, 99 U.S. 505, 506-507 (1879), *Richardson* v. *Green*, 130 U.S. 104, 111 (1889), and *Green* v. *Elbert*, 137 U.S. 615, 621-623 (1891), as examples of cases where the statutory jurisdictional requirements were ignored in order better to serve justice. As a recent example of a civil case decided on its merits by the Supreme Court on certiorari, despite late filing, see *Ray* v. *Pierson*, 386 U.S. 547 (1967).

The instant case presents substantial and constitutional federal questions which ought to be considered by the Supreme Court, as the individual's protection against the demands of government are important, especially so when those demands involve the taking of property and just compensation therefor.

The language of the statute need not be strictly adhered to without consideration of extenuating circumstances. Indeed, while ruling with regard to the 60-day period for appeals from the United States District Court, the Supreme Court specifically recognized that "[i]t will not expedite determination of constitutional questions to dismiss appeals because of errors of practice." *United Public Workers of America* v. *Mitchell*, 330 U.S. 75, 86 (1947). Applying a reasonable interpretation of the statutory jurisdictional re-

quirements to the instant case, the Supreme Court may, consistent with its past decisions, grant this petition for a writ of certiorari.

II. The Opinion of the Court Below Inaccurately Relies on Marco S. Marinello Assoc. Inc. v. Commissioner, 535 F. 2d 147 (1st Cir. 1976), and the Claim of Right Doctrine in Ruling that the Petitioner had Realized a Capital Gain in 1966 on the Receipt of a "Pro Tanto Payment."

In November, 1966, the Massachusetts Turnpike Authority, pursuant to the provisions of M.G.L. c. 79, § 8A, offered to make a payment pro tanto to the petitioner and Richard S. Robie as tenants in common, in reference to the condemnation of certain realty. M.G.L. c. 79, § 8A, allows an individual to elect to take a "pro tanto payment" without any prejudice to a subsequent judicial assessment which could be either higher or lower than the pro tanto. There is no provision in M.G.L. c. 79, § 8A, for payment of a part of a pro tanto payment to one tenant in common and the withholding of the other portion of the pro tanto payment from the other tenant in

common, where only one of the two tenants in common desires to obtain the pro tanto payment. The petitioner had no desire to accept the pro tanto offer, but, at the behest of Richard S. Robie, his tenant in common, a payment pro tanto was made in November, 1966.

In *Marco S. Marinello Assoc. Inc.* v. *Commissioner of Internal Revenue*, 535 F. 2d 147 (1st Cir. 1976), Marinello, as the sole owner of the realty taken in a Massachusetts condemnation proceeding, elected to take this pro tanto payment pursuant to M.G.L. c. 79, § 8A. The taxpayer in *Marinello* received the pro tanto payment in February, 1965, and a jury assessment in April, 1966. Thus, the taxpayer in *Marinello*, in accordance with the provisions of § 1033(a)(3)(A) and (B) of the Internal Revenue Code of 1954 (hereinafter "Code") knew the amount of money he would have to invest in replacement property before a tax would be due or, in the alternative, could apply on a timely basis for an extension of time within which to replace his converted property On the basis of the aforesaid facts, the court below in *Marinello* affirmed the decision of the United States Tax Court that the taxpayer realized a taxable gain in the calender year in which he received his pro tanto payment as well as in

the year in which he received his final jury award.

The factual situation involving your petitioner is clearly distinguishable from the *Marinello* case. The petitioner did not voluntarily elect to receive his pro tanto payment in 1966, nor did he know, by the end of 1967, the full amount of money he would have to invest in replacement property. To hold, as the Commissioner asserted and as affirmed by the lower courts, that the petitioner must buy property before he knows how much money he may have available to purchase is manifestly inequitable and unjust. Further, it would be unreasonable to expect the petitioner to reinvest the pro tanto payment when some of it might have to be refunded to the condemning authority.

The petitioner believes that if his writ of certiorari is granted, he can show that the payment pro tanto which was issued in November, 1966, at the request of his co-tenant was a temporary payment subject to refund. The petitioner would further show that he did not receive the pro tanto payment under a claim of right and without restriction as to its disposition as required by this Court in the leading case of *North*

American Oil Consol. v. *Burnet*, 286 U.S. 417 (1932).

The "claim of right" doctrine enunciated in the *North American Oil* decision is not applicable in the instant case. The factual background of the present action is one of eminent domain. The "claim of right" doctrine has never been applied by this Court with reference to the taxation of proceeds from an eminent domain proceeding. The *Marinello* decision, which deals with the question of the taxation of proceeds from an eminent domain proceeding, has already been distinguished.

Finally, the petitioner would show that no gain was realized until January 19, 1968, when, pursuant to the just compensation clause of the Fifth Amendment, he received his condemnation award as determined by a judicial proceeding with judge and jury. The theory of taxability of constructive income does not require a taxpayer to report income which it may never receive. *Burnet* v. *Logan*, 283 U.S. 404 (1931). Mr. Justice Brandeis in the leading case of *Lucas* v. *American Code Co.*, 280 U.S. 445 (1930), established the test for whether or not a given transaction would be treated under the income tax laws in a given year by stating the following:

> "Generally speaking, the income-tax law is concerned only with realized losses, as with realized gains. *Weiss* v. *Wiener*, 279 U.S. 333, 335. Exception is made however, in the case of losses which are so reasonably certain in fact and ascertainable in amount as to justify their deduction, in certain circumstances, before they are *absolutely realized*." (Emphasis added.) *Id.* at 449.

Mr. Justice Holmes, in *Weiss* v. *Wiener*, 279 U.S. 333 (1929), made the following statement that was generally recognized:

> "The income tax laws do not profess to embody perfect economic theory. They ignore some things that either a theorist or a business man would take into account in determining the pecuniary condition of the taxpayer. They do not charge for appreciation of property or allow a loss from a fall in market value unless realized in money by a sale." *Id.* at 335.

It is the petitioner's contention that an eminent domain taking is in the nature of a forced sale. *Beeland Wholesale Co.* v. *Kaufman*, 234 Ala. 249, 174 So. 516 (1937). When the forced sale is completed, which is the date that just compensation is finally awarded, then there is realized income which is subject to taxation.

The petitioner requests this Court to interpret the "claim of right" doctrine as it was construed at the time of its inception.

Commissioner v. *R.J. Darnell, Inc.*, 60 F. 2d 82 (6th Cir. 1932), was the Sixth Circuit decision interpreting the "claim of right" doctrine. The holding in that case was that "[t]he transaction must truly be a closed one, in the practical acceptance of the term, in order that there may be even a constructive receipt of profits." *Id.* at 84.

The Supreme Court's reference in *North American Oil* to the decision of the Sixth Circuit in *Board* v. *Commissioner*, 51 F. 2d 73 (1931), further supports the belief that earnings and net profits must be involved before the "claim of right" doctrine is truly applicable, for in the *Board* case the amounts at issue were net profits and were so labeled by the court.

In addition, the petitioner strongly believes that *Taylor* v. *Commissioner*, 89 F. 2d 465 (7th

Cir. 1937), cert. den. 302 U.S. 727 (1937), is a commanding case on the interpretation of "claim of right" doctrine. The Court of Appeals for the Seventh Circuit held that "[i]t is well settled that income taxes are concerned only with realized gains. Paper profits or estimated profits are not realized gains until . . . the transaction is completed." *Id.* at 468. The Seventh Circuit has interpreted *North American Oil* to stand for the proposition that receipts are taxable only when the transaction is completed and the income is actually realized, that is, earned.

The petitioner respectfully submits that, in accordance with the *Lucas* decision and the above mentioned cases, no gain was "absolutely realized" until January, 1968, when a jury determination of petitioner's "just compensation," as required by the Fifth Amendment, was made.

III. The Commissioner Abused his Discretion in Denying the Petitioner's Timely Application for Extension of Time Within Which to Replace Involuntarily Converted Property.

On December 10, 1969, the petitioner, through his tax accountant, filed a request for an

extension of time to replace property involuntarily converted in accordance with § 1033 of the Code and the regulations promulgated thereunder. The aforesaid Code and regulations provisions specify that a taxpayer has one year after the close of the first taxable year in which any gain is realized to replace his involuntarily converted property or, in the alternative, to apply for an extension of time to do the same if he can show reasonable cause for not being able to replace the converted property within the required period of time. During the period from November, 1966, through January, 1968, the petitioner did not know the amount of money he would have to reinvest, but, in spite of this fact, he made continual efforts to locate properties which would be suitable for investment.

The petitioner based his application for an extension of time on the fact that he was unable to find suitable replacement property similar to the property taken. Certainly, a reading of the Internal Revenue Code shows no intention to require a taxpayer to invest in just any property. In fact, the Code, § 1033(a)(3)(A), states that the replacement property must be similar or related in service or use to the property converted.

On the basis of these facts, the Commissioner, on January 19, 1970, denied petitioner's application for an extension of time to replace the converted property because the request had not been received within the time specified by § 1.1033(a)-2(c)(3), Income Tax Regs. However, as has been previously pointed out, petitioner's condemnation award was not final until January 19, 1968. His application for an extension of time, which was filed on December 10, 1969, was made prior to the expiration of one year after the close of the first taxable year in which petitioner realized a gain from the conversion of his property, and, therefore, was timely.

It should further be pointed out that Congress, since 1969, has changed the replacement time requirement under § 1033 of the Code to two years (Tax Reform Act of 1969) and three years (Tax Reform Act of 1975). It appears that even Congress believed that neither one year nor even two years were sufficient in which to replace involuntarily converted property.

Based on the foregoing, the petitioner believes he can show, if this writ of certiorari is granted, that he had reasonable cause for failure to replace his involuntarily converted property, and the Commissioner abused his discretion in failing

to grant an extension of time in response to petitioner's timely filed application. Further, the petitioner believes he can show that there existed an intent on the part of Congress to expand the period of time since it recognized that the one-year period was insufficient within which to require a taxpayer to replace involuntarily converted property.

IV. The Stopping of Interest on a Condemnation Award as Allowed by M.G.L. c. 79, § 8A, upon the Issuance of a "Pro Tanto" Payment is a Violation of the Just Compensation Clause of the Fifth Amendment as Well as the Due Process Clause of the Fourteenth Amendment.

M.G.L. c. 79, § 8A, which appears, *infra*, at Appendix C, provides for the stopping of interest on a condemnation award upon the issuance of a "pro tanto" payment. In the instant case, the petitioner was issued, without his authorization, a "pro tanto" payment in November, 1966. The petitioner received his condemnation award in January, 1968. The petitioner did not receive any interest on his condemnation award for the

period between November, 1966, and January, 1968. It must be noted that no other state could be found to be using "payment pro tanto" in its statutes or in its cases. Also, after searching the legislative history of M.G.L. c. 79, § 8A, it was not ascertainable how the "pro tanto" doctrine originated or developed.

The petitioner calls to the attention of the Court the warning statement issued by Mr. Justice Bradley in *Boyd* v. *United States*, 116 U.S. 616, 635 (1886):

> "[I]llegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon. Their motto should be *obsta principiis*. We

have no doubt that the legislative body is actuated by the same motives; but the vast accumulation of public business brought before it sometimes prevents it, on a first presentation, from noticing objections which become developed by time and the practical application of the objectionable law."

It is the petitioner's contention that M.G.L. c. 79, § 8A, which allows for this loss of interest on his condemnation award, violates the just compensation clause of the Fifth Amendment as well as the due process clause of the Fourteenth Amendment.

In support of the above position, the petitioner refers this Court to the leading case of *Monongahela Navigation Co.* v. *United States*, 148 U.S. 312, 327 (1893), wherein it was stated:

> "The legislature may determine what private property is needed for public purposes — that is a question of a political and legislative character; but when the taking has been ordered, then the *question of compensation is judicial*. It does not rest with the public, taking the property, through Congress or the

> legislature, its representative, to say what compensation shall be paid, or even what shall be the rule of compensation. The Constitution has declared that just compensation shall be paid, and the ascertainment of that is a judicial inquiry." (Emphasis added.)

In *Jacobs* v. *United States*, 290 U.S. 13, 16-17 (1933), this Court stated:

> "The amount recoverable was just compensation, not inadequate compensation. The concept of just compensation is comprehensive and includes all elements, 'and no specific command to include interest is necessary when interest or its equivalent is a part of such compensation.' The owner is not limited to the value of the property at the time of the taking; 'he is entitled to such addition as will produce the full equivalent of that value paid contemporaneously with the taking.' *Interest at a proper rate 'is a good measure by which to ascertain the amount so to be added.'* . . . [T]he Court held that the right to just compensation could *not be taken away by statute* or be qualified by the omis-

sion of a provision for interest where such an allowance was appropriate in order to make the compensation adequate." (Emphasis added.)

For the propositions stated in the *Monongahela* and *Jacobs* opinions, the cases of *Phelps* v. *United States*, 274 U.S. 341 (1927), and *McCandless* v. *United States*, 298 U.S. 342 (1936), are also instructive. Mr. Justice Sutherland in *McCandless* explicitly stated: "In an eminent-domain proceeding, the vital issue — and generally the only issue — is that of just compensation." *Id.* at 348. The *Phelps* case is enlightening in that it held that "[a]cts of Congress are to be construed and applied in harmony with and not to thwart the purpose of the Constitution. The Government's obligation is to put the owners in as good position pecuniarily as if the use of their property had not been taken." *Id.* at 344.

In light of this Court's position on what constitutes "just" or "adequate" compensation, it is the petitioner's contention that the stopping of interest on his condemnation award as authorized by M.G.L. c. 79, § 8A, constituted "inadequate" compensation and thus violated the Fifth Amendment, as well as the due process clause of the Fourteenth Amendment. Furthermore, in accordance with the *Monongahela* decision, this legislative provision is an usurpation of the "judicial inquiry" provided for every citizen of the United States in an eminent domain proceeding.

Conclusion.

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the First Circuit.

Respectfully submitted,

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Appendix A.

UNITED STATES TAX COURT

T. C. Memo. 1976-57

EDWARD L. FORD, PETITIONER *v.* COMMISSIONER OF INTERNAL REVENUE, RESPONDENT.

Docket No. 2207-72. Filed March 3, 1976.

Wallace E. Whitmore and *David M. Bond*, for the petitioner.

Willard J. Frank, for the respondent.

Memorandum Opinion.

TIETJENS, *Judge*: The Commissioner determined deficiencies in Federal income taxes of petitioner for the taxable years 1966 and 1968 in the amounts of $60,912.47 and $100,593.78, respectively. The issues to be decided are:

(1) Whether petitioner realized capital gain in the taxable years 1966 and 1968 upon receipt of compensation for property taken by eminent domain.

(2) Whether the district director of internal revenue properly exercised his discretion in denying petitioner an extension of time to replace converted property under section 1.1033(a)-2(c)(3), Income Tax Regs., thereby preventing petitioner from utilizing the nonrecognition provision of section 1033, I.R.C. 1954.[1]

This case was fully stipulated pursuant to Rule 122, Tax Court Rules of Practice and Procedure. The facts which we deem necessary for decision will be referred to below.

Petitioner Edward L. Ford resided at 10 Whittier Road, Wellesley, Massachusetts 02181, at the time the petition herein was filed. His Federal income tax returns for 1966 and 1968 were filed on the cash basis with the district director of internal revenue, Boston, Massachusetts.

On or before October 18, 1962, petitioner was a tenant in common with Richard S. Robie of a parcel of real estate located at Soldier's Field Road and Western Ave., Brighton, Massachusetts. His basis in this piece of property was $178,750. On October 18, 1962, the Massachusetts Turnpike Authority took this piece of property by eminent domain. The pro-

[1] All statutory references are to the Internal Revenue Code of 1954 unless otherwise stated.

ceedings between petitioner and the Massachusetts Turnpike Authority regarding the taking were conducted under the provisions of the Law of November 6, 1963, ch. 793, sec. 2, Mass. Acts and Resolves 720, amending Law of September 21, 1959, ch. 626, sec. 3, Mass. Acts and Resolves 566, which was amended by Mass. Gen. Laws Ann., ch. 79, sec. 8A (1966).

On November 10, 1966, pursuant to the provisions of this law, the Massachusetts Turnpike Authority made a "payment pro tanto" in the amount of $844,800 to petitioner and Robie. Petitioner's share of the "payment pro tanto" was $422,400, which petitioner deposited in his personal bank account at the Capital City Bank.

Petitioner and Robie, as tenants in common, filed a petition in Suffolk Superior Court of the Commonwealth of Massachusetts for the assessment of damages resulting from the taking. The petition resulted in an award of $1,500,000 to them against which the prior "payment pro tanto" of November 1966 in the amount of $844,800 was applied. The balance of $655,200 was paid on or about January 19, 1968. Petitioner's share of the additional award was $327,600.

As of February 5, 1974, petitioner had not replaced the property, nor had he invested any money in such replacement property.

On December 10, 1969, the petitioner applied to the district director of internal revenue, Boston, Massachusetts, for an extension of time to replace the converted property. Following a request for additional information from the district director, petitioner sent a letter describing the property; and listing the date of taking, the basis of the property, the amount and date of receipt of the pro tanto award, the amount and date of the final award, and the amount of interest received. On January 19, 1970, the district director denied petitioner's application for an extension of time to replace the converted property because the request had not been received within the time specified by section 1.1033(a)-2(c)(3), Income Tax Regs. Petitioner had offered no explanation in his application for filing after the time period specified in the statute.

On October 21, 1971, petitioner reapplied for an extension of time to replace the converted property. He explained that he had not filed his original request on time because of advice given by his advisor, John Fahey, a former employee of the Internal Revenue Service. In denying petitioner's reapplication, the district director stated that the advice of petitioner's advisor did not constitute "reasonable cause."

John Fahey is petitioner's brother-in-law. Petitioner over the years (including the years in question) relied on him to prepare his income tax returns. John Fahey, who holds a treasury card to practice before the Internal Revenue Service, is neither a certified public accountant nor an attorney.

In 1966 petitioner mentioned the pro tanto award to John Fahey. From the informal discussion that followed Fahey assumed that petitioner had not actually received the cash and that the total award was only $422,400. Believing that only half of this would ultimately be petitioner's, and knowing that petitioner and his cotenant planned to sue for a greater amount, he came to the conclusion that petitioner did not have to mention the pro tanto award on his 1966 return. Not until 1969 did petitioner provide Fahey with documentation concerning the award.

Petitioner made several efforts to locate suitable property for reinvesting the money he had received from the taking. However, he did not replace the converted property because he believed that the prices of available property

were too high, that there would not be a sufficient return of his investment, and that available property was scarce.

The Commissioner takes the position that petitioner realized capital gain in 1966 and 1968 upon the receipt of payments for his property under a claim of right without restriction as to their use. Petitioner asserts he realized no gain until 1968 because the pro tanto award was temporary, because it was not received under a claim of right, and because he could not replace the property without knowing how much he would ultimately receive.

Petitioner received the pro tanto award in 1966. Accepting it meant that petitioner and his cotenant retained the right to seek additional damages but could also be required to return part of the award, with interest, if the amount exceeded the damages ultimately determined by a court. Petitioner and Robie did file a petition for assessment of additional damages, and in 1968 they received a greater total award against which the payment pro tanto was applied.

Petitioner denies that he received the pro tanto award under a claim of right; nonetheless, he deposited the award in his personal bank account, he had unrestricted use of it, and he in-

itiated further proceedings to increase it. We cannot conclude other than that he received the award under a claim of right. See *Marco S. Marinello Associates, Inc.*, T. C. Memo. 1975-78, in which we held that where a taxpayer received a "payment pro tanto" pursuant to the identical Massachusetts statute at issue here, for realty taken by the Commonwealth of Massachusetts for highway purposes, it received said payment under a claim of right; *North American Oil v. Burnet*, 286 U.S. 417 (1932) and *Boyce v. United States*, 405 F.2d 526 (Ct. Cl. 1968).

Petitioner also argues that the possibility of a refund rendered the payment temporary and because it was temporary no gain or loss could be determined until a final award was entered. The law is settled that when proceeds of a condemnation award are paid under a claim of right, and without restriction as to their use, gain is realized whenever the total receipts exceed the adjusted basis of the condemned property even though at the time of receipt conditions exist which could require the taxpayer to return part or all of such earnings. *Casalina Corp.*, 60 T.C. 694 (1973), affd. per curiam 511 F.2d 1162 (4th Cir. 1975); *Scolari v. Commissioner*, 497 F.2d 962 (9th Cir.

1974), affirming per curiam a Memorandum Opinion of this Court; *Town Park Hotel Corp. v. Commissioner*, 446 F.2d 878 (6th Cir. 1971), affirming per curiam a Memorandum Opinion of this Court; *R. A. Stewart & Co.*, 57 T.C. 122 (1971); *Conlorez Corp.*, 51 T.C. 467 (1968); *Adolph K. Feinberg*, 45 T.C. 635 (1966), affd. 377 F.2d 21 (8th Cir. 1967); *Marco S. Marinello Associates, Inc., supra.*

Petitioner attempts to distinguish many of the above cited cases by claiming that he had only temporary use of the money and that no gain or loss could be determined until final judgment. He also relies on minor factual details to assert inapplicability. Unfortunately, petitioner confuses his legal assertions (i.e., temporary use of the money) for facts and consequently makes distinctions without basis. In the process, he ignores the established criteria which determines when gains from involuntary conversions become taxable.

Petitioner's final argument under this issue is that since he did not know how much he would have to spend on replacement property which, he asserts, prevented him from replacing it in 1966, he consequently did not realize gain until 1968. We also find this argument without merit. As

we have already pointed out, gain is realized when the total receipts exceed the adjusted basis of the condemned property even though at the time of receipt conditions exist which could require the taxpayer to return part or all of such earnings.

Petitioner in conclusion argues that, if we determine that gain was realized by virtue of the 1966 payment, he is entitled to defer recognition of that gain under the regulations issued pursuant to section 1033.

At the time of the taking, section 1033 allowed petitioner one year[2] after the close of the taxable year in which any part of the gain was realized to purchase replacement property. Such a purchase within the proscribed time period would have postponed recognition of his gain. The parties have stipulated that as of February 5, 1974, petitioner had not purchased replacement property.

Nonetheless, petitioner argues that the district director abused his discretion in refusing to grant his requests for an extension of time in which to replace the converted property.

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[2]Extended to two years for dispositions occurring after December 30, 1969. Tax Reform Act of 1969, sec. 915(a).

In the regulations (section 1.1033(a)-2, Income Tax Regs.) issued pursuant to section 1033(a)(3)(B)(ii), the Commissioner requires that applications for extension be made within the same time period otherwise prescribed for the replacement of converted property, or later if the applicant satisfies the district director that (1) lateness was due to a reasonable cause and (2) the application was filed within a reasonable time after expiration of the required period.

Petitioner realized gain in 1966; therefore, he had until the end of 1967 to comply with the requirements of section 1033 and the regulations issued thereunder in order to avoid recognition of his gain. Offering no explanation for his late application, he filed a request for an extension in December 1969. The district director denied the request because it was late. Approximately 22 months later, on October 21, 1971, petitioner reapplied for an extension in which to replace the converted property. Petitioner explained that he had filed the original request late because of advice given by his advisor, John Fahey, a former employee of the Internal Revenue Service. The district director again denied the request.

From the above stated facts, we conclude that petitioner met neither one of the prerequisites

established by the regulations for the consideration of late applications for extension of time in which to replace property taken by eminent domain. Petitioner's original application was filed 23 months late with no explanation for its lateness. Compare *James E. Latimer*, 55 T.C. 515 (1970), in which we held 10 months' lateness unreasonable and *Theron M. Lemly*, T. C. Memo. 1973-147, in which we found 6 months' delay reasonable where taxpayer's certified public accountant had died but in "sharp contrast" to the 10-month delay in *Latimer*.

Not until the reapplication, on October 21, 1971, did petitioner offer any explanation for his late application. Then he said he had relied on the advice of an advisor. Petitioner looks to Rev. Rul. 72-27, 1972-1 C.B. 226, to support this reliance; however, we are of the opinion that thus ruling does not help petitioner. There taxpayer's reliance in good faith on the advice of a reputable accountant and attorney, both of whom were experienced in Federal tax matters and to whom *all relevant information had been furnished*, was considered reasonable cause for the lateness of an application for extension filed *shortly after* expiration of the specified replace-

ment period and *immediately* upon learning of the error.

First, we cannot conclude that petitioner relied in good faith on the advice of John Fahey, regardless of any determination we might make about his tax expertise. He neither supplied his advisor with documentation nor gave him enough information upon which Fahey could give adequate advice. Fahey stated that he assumed petitioner had not receive the funds in 1966 and in addition believed the "payment pro tanto" was half its actual amount. Second, petitioner did not file his application for an extension shortly after expiration of the specified replacement period nor did he file his reapplication immediately upon learning of his error (if we assume that the district director's denial was his first notification of his mistake). See *Casalina Corp., supra, Marco S. Marinello Associates, Inc., supra.* Therefore, we conclude that the district director did not abuse his discretion in denying petitioner's applications for an extension.

Decision will be entered for the respondent.

UNITED STATES TAX COURT

EDWARD L. FORD,
PETITIONER,
v. DOCKET NO. 2207-72.
COMMISSIONER OF
INTERNAL REVENUE,
RESPONDENT.

Decision.

Pursuant to the determination of the Court, as set forth in Memorandum Opinion, filed March 3, 1976, it is

ORDERED AND DECIDED: That there are deficiencies in income taxes due from the petitioner for the taxable years 1966 and 1968 in the amounts of $60,912.47 and $100,593.78, respectively.

NORMAN O. TIETJENS,
Judge

Entered: March 3, 1976.

Appendix B.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT.

No. 76-1301.

EDWARD L. FORD,
PETITIONER, APPELLANT,

v.

COMMISSIONER OF INTERNAL REVENUE,
RESPONDENT, APPELLEE.

Judgment.

Entered October 21, 1976.

This cause came on to be heard on appeal from the United States Tax Court, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The order of the Tax Court is affirmed.

By the Court:
DANA H. GALLUP,
Clerk.

Opinion.

COFFIN, *Chief Judge.* In 1962 the Massachusetts Turnpike Authority took property in which this taxpayer received a "pro tanto" payment of $422,000, and in January of 1968 he won a final award entitling him to an additional $327,000. In December of 1969, still hoping to take advantage of 26 U.S.C. § 1033, the taxpayer asked the district director for more time to replace the converted property. This request was denied as untimely. In October of 1971 the taxpayer applied for an extension, explaining that his failure to file a timely request was the result of unwarranted reliance on the advice of his brother-in-law, a former Internal Revenue Service employee. This request came some 46 months after the statutory period for replacing his property expired. It was denied. The Commissioner asserted a deficiency, which the taxpayer contested in the Tax Court. This is an appeal from the adverse decision of the Tax Court. The taxpayer argues that he realized no gain before 1968 and that the district director abused his discretion in failing to grant the requested extensions. These arguments were recently rejected by this court, and we see no reason to

reconsider that decision. *Marco S. Marinello Assoc., Inc.* v. *Commissioner*, 535 F.2d 147 (1st Cir. 1976), *aff'g* 34 T.C.M. 392 (1975).

Affirmed.

Appendix C.

MASSACHUSETTS GENERAL LAWS, CHAPTER 79.

§ 8A. [Offer of settlement; payment pro tanto; refund of excess.]

The board of officers who have made a taking under this chapter shall, prior to the expiration of sixty days subsequent to the recording of the order of taking, offer in writing to every person entitled to damages on account of such taking a reasonable amount which such board is willing to pay, either in settlement under section thirty-nine of all damages for such taking with interest thereon, together with taxable costs, if any, or as a payment pro tanto. If such person elects to accept the offer as a pro tanto payment, such election shall be without prejudice to or waiver or

surrender of any right to claim a larger sum by proceeding before an appropriate tribunal. If such tribunal shall assess damages in an amount less than the amount actually paid as a pro tanto payment, the petitioner shall be ordered by a proper decree to refund to the body politic or corporate an amount equal to the difference between the pro tanto payment and the amount of damages so found by such tribunal, plus costs and interest at the rate of six per cent per annum from the date when such damages were assessed.

After a pro tanto payment has been made or after an offer of payment has been made in writing as required by this section and not accepted, no interest shall be recovered except upon such amount of damages as shall upon final adjudication be in excess of said payment or in excess of the written offer of payment as herein described; provided, however, that all taxable costs accruing subsequently to such payment or to such written offer of payment shall be recoverable by the petitioner if the adjudicated damages exceed such payment or such offer, otherwise the petitioner shall be liable for and pay such costs.

Added by St. 1959, c. 626, § 3. Amended by St. 1963, c. 793, § 2; St. 1966, c. 530, § 1.

Historical Note

Section 6 of the 1959 enactment provided: "This act shall apply only to orders of taking adopted on and after the effective date of this act."

St. 1963, c. 793, § 2, an emergency act, approved Nov. 6, 1963, increased the interest rate in the second paragraph from 4% to 6%. See, also, notes under section 37 of this chapter.

St. 1966, c. 530, § 1, approved Aug. 17, 1966, rewrote the section, which prior thereto read:

"A board of officers who have made a taking under this chapter may at any time after the right to damages for such taking has become vested, and, if so requested by a person entitled to damages at any time after the right to damages has become vested, shall before the expiration of nine months after the right to damages vested or, in the case of a request made more than three months after the right to damages vested, before the expiration of six months after such request, offer in writing to every person entitled to

damages on account of such taking a reasonable amount which such board is willing to pay either in settlement under section thirty-nine of all damages for such taking, with interest thereon and taxable costs, if any, or as a payment pro tanto which may be accepted and collected forthwith without prejudice to or waiver or surrender of any right to claim a larger sum by proceeding before an appropriate tribunal, but subject to the obligation imposed by this section to refund an amount equal to the difference between such payment and the damages subsequently assessed by such tribunal if such offer is accepted as a payment pro tanto and such payment shall prove to be in excess of the damages subsequently assessed by such tribunal. At the election of the person accepting such offer, acceptance thereof may be either in settlement as aforesaid or as such payment pro tanto. After payment of such offer or tender of such payment, no interest shall be recovered, except upon such amount of damages as shall, upon final adjudication, be in excess of the amount of such offer; provided, that all taxable costs accruing subsequently to such offer shall be recoverable by the petitioner in all cases, except as provided in section thirty-eight.

"In the event that a payment pro tanto shall prove to be in excess of damages subsequently assessed by an appropriate tribunal, the petitioner shall be ordered by a proper decree to refund to the body politic or corporate an amount equal to the difference between the payment pro tanto and the damages subsequently assessed, plus costs and interest at the rate of six per cent per annum from the date as of which damages were assessed."

Law Review Commentaries

Eminent domain. Julian J. D'Agostine and Richard G. Huber. 13 Annual Survey of Mass.Law. Boston College, p. 207 (1966)

Library References

Eminent Domain ‡ 163. C.J.S. Eminent Domain § 191.

Notes of Decisions

1. In general

Practice of Massachusetts Turnpike Authority in making pro-tanto offers does not violate provi-

sions of the law. Op. Atty. Gen. March 19, 1964, p. 200.

Under law of eminent domain Massachusetts Turnpike Authority has power to enter upon private property for purpose of making appraisals prior to taking. Id.

Certain administrative procedure of present land-taking routine of Massachusetts Turnpike Authority must be reformed. Op. Atty. Gen. Jan. 28, 1964, p. 167.

Appendix D.

INTERNAL REVENUE CODE OF 1954 (26 U.S.C.).

SEC. 1033. Involuntary Conversions.

(a) *General Rule.* — If property (as a result of its destruction in whole or in part, theft, seizure, or requisition or condemnation or threat or imminence thereof) is compulsorily or involuntarily converted —

(1) *Conversion into similar property.* — Into property similar or related in service or use to

the property so converted, no gain shall be recognized.

. . . . . .

(3) *Conversion into money where disposition occurred after 1950.* —Into money or into property not similar or related in service or use to the converted property, and the disposition of the converted property (as defined in paragraph (2)) occurred after December 31, 1950, the gain (if any) shall be recognized except to the extent hereinafter provided in this paragraph:

(A) *Nonrecognition of gain.* — If the taxpayer during the period specified in subparagraph (B), for the purpose of replacing the property so converted, purchases other property similar or related in service or use to the property so converted, or purchases stock in the acquisition or control of a corporation owning such other property, at the election of the taxpayer the gain shall be recognized only to the extent that the amount realized upon such conversion (regardless of whether such amount is received in one or more taxable years) exceeds the cost of such other property or such stock. Such election shall be made at such time and in such manner as the

Secretary or his delegate may by regulations prescribe.

. . . . . .

(B) *Period within which property must be replaced.* — The period referred to in subparagraph (A) shall be the period beginning with the date of the disposition of the converted property, or the earliest date of the threat or imminence of requisition or condemnation of the converted property, whichever is the earlier, and ending —

(i) one year after the close of the first taxable year in which any part of the gain upon the conversion is realized, or

(ii) subject to such terms and conditions as may be specified by the Secretary or his delegate, at the close of such later date as the Secretary or his delegate may designate on application by the taxpayer. Such application shall be made at such time and in such matter as the Secretary or his delegate may by regulations prescribe.

TREASURY REGULATIONS ON INCOME TAX
(1954 CODE) (26 C.F.R.).

§ 1.1033(a)-2. *Involuntary conversion where disposition of the converted property occurred after December 31, 1950.*

. . . . . .

(c) *Conversion into money or into dissimilar property.*

. . . . . .

(2) All of the details in connection with an involuntary conversion of property at a gain (including those relating to the replacement of the converted property, or a decision not to replace, or the expiration of the period for replacement) shall be reported in the return for the taxable year or years in which any of such gain is realized. An election to have such gain recognized only to the extent provided in subparagraph (1) of this paragraph shall be made by including such gain in gross income for such year or years only to such extent. If, at the time of filing such a return, the period within which the converted property must be replaced has expired, or if such an election is not desired, the gain should be included in gross income for such year or years in the regular manner.

(3) The period referred to in subparagraphs (1) and (2) of this paragraph is the period of time commencing with the date of the disposition of the converted property, or the date of the beginning of the threat or imminence of requisition or condemnation of the converted property, whichever is earlier, and ending 2 years, (or, in the case of a disposition occurring before December 31, 1969, 1 year) after the close of the first taxable year in which any part of the gain upon the conversion is realized, or at the close of such later date as may be designated pursuant to an application of the taxpayer. Such application shall be made prior to the expiration of 2 years (or, in the case of a disposition occurring before December 31, 1969, 1 year) after the close of the first taxable year in which any part of the gain from the conversion is realized, unless the taxpayer can show to the satisfaction of the district director —

(i) Reasonable cause for not having filed the application within the required period of time, and

(ii) The filing of such appplication was

made within a reasonable time after the expiration of the required period of time.

The application shall contain all of the details in connection with the involuntary conversion. Such application shall be made to the district director for the internal revenue district in which the return is filed for the first taxable year in which any of the gain from the involuntary conversion is realized. No extension of time shall be granted pursuant to such application unless the taxpayer can show reasonable cause for not being able to replace the converted property within the required period of time.

. . . . . .